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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

AMERICAN HOME ASSURANCE COMPANY etc., Plaintiff and Appellant, v. STATE OF CALIFORNIA, Defendant and Respondent; NORWOOD JONES, III, Intervener and Appellant.	B218534 (Los Angeles County Super. Ct. No. KC044996)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County, Ricardo A. Torres, Judge. Reversed in part with directions; dismissed in part.

Laughlin, Falbo, Levy & Moresi, Priscilla W. Lloyd; Hollins • Schechter, Andrew S. Hollins; Hollins Law and Kathleen Mary Kushi Carter for Plaintiff and Appellant and for Intervener and Appellant.

Ronald W. Beals, Linda Cohen Harrel, Jill Siciliano-Okoye and Mark A. Berkebile for Defendant and Respondent.

INTRODUCTION

Plaintiff American Home Assurance Company (American Home)[1] and plaintiff-in-intervention Norwood Jones, III (Jones) (collectively plaintiffs) appeal from the judgment entered in favor of defendant, the State of California (State). (Code Civ. Proc., § 904.1, subd. (a)(1).) Plaintiffs also appeal from an order denying their motion for a new trial, an order denying their motion for judgment notwithstanding the verdict and an order denying their motion to vacate the judgment. Of these three orders, only the order denying the motion for judgment notwithstanding the verdict is appealable (Code Civ. Proc., § 904.1, subd. (a)(4); *Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1300, fn. 1). The order denying the motion for new trial is not appealable, but its propriety may be challenged on appeal from the judgment (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18; *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 415; *City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813, 819-820). Subject to an exception inapplicable here, the order denying a statutory motion to vacate a judgment (Code Civ. Proc., § 663) is not separately appealable. (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 890; *311 South Spring Street Co. v. Department of General Services* (2009) 178 Cal.App.4th 1009, 1014; *City of Los Angeles v. Glair*, *supra*, at pp. 820-823; *Payne v. Rader* (2008) 167 Cal.App.4th 1569, 1576; contra, *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 663; *Norager v. Nakamura* (1996) 42 Cal.App.4th 1817, 1819, fn. 1; *Howard v. Lufkin* (1988) 206 Cal.App.3d 297, 300-303; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 200, pp. 275-278.)

Plaintiffs contend the trial court improperly granted the State a partial directed verdict on the issue of design immunity and loss thereof and removed factual issues relevant to these issues from the jury, thereby violating their right to a jury trial.

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[1] American Home sued through its adjusting agent, Sedgwick CMS, Inc. For ease of reference we refer solely to American Home.

Plaintiffs also raise claims of instructional error and evidentiary error and maintain they are entitled to a new trial as a result of juror misconduct. They further claim an entitlement to judgment in their favor on their causes of action against the State for a dangerous condition of public property and on Jones's cause of action for negligence against the State. We dismiss plaintiffs' appeal from the nonappealable orders denying their motion for a new trial and motion to vacate the judgment, we dismiss as moot plaintiffs' appeal from the order denying their motion for judgment notwithstanding the verdict, and we reverse the judgment with directions to try the matter anew.

FACTS[2]

A. *Accident*

On the morning of January 4, 2004, Jones, an employee of Verizon Communications (Verizon), left an employee meeting in Whittier to drive to the Verizon retail store in Montclair where he worked. His intended route was the Interstate 605[3] north to the Interstate 10 east,[4] exiting at Monte Vista in Montclair. He had never before driven this route. Traffic was light, the road was dry and the weather was sunny. Jones recalled no problem with visibility on the connector ramp.

Jones drove his 1997 Acura 2.2 CL northbound on the 605 freeway. While transitioning to the eastbound 10, his car veered to the left. When Jones steered right to make a correction, his Acura fishtailed, then spun, rolled over and stopped on its wheels

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[2] Additional facts will be incorporated into the legal discussion where relevant.

[3] Interstate 605 is also known as the San Gabriel River Freeway. We will refer to it as the 605 or the 605 freeway.

[4] The portion of Interstate 10 with which we are concerned is commonly referred to as the San Bernardino Freeway. For ease of reference, we will refer to it as the 10 or the 10 freeway. The ramp from the northbound 605 to the eastbound 10 will be referred to as the transition ramp, the connector ramp or the interchange.

in a grassy area adjacent to the transition ramp. Jones, who was almost six feet, seven inches, suffered paralysis as a result of the accident. He was 23 years old at the time.

Jones's accident occurred at post mile 20.034. This post mile represents the area from the gore point where the collector road splits to where the connector ramp merges with the 10 freeway.

While at the hospital, Jones told California Highway Patrol Officer Tariq Johnson that he had been travelling about 65 miles per hour in the number one lane of the connector ramp when his car started to fishtail. He lost control of his car, which collided into a "curb" and then flipped over an unknown number of times. At trial, however, Jones claimed he was traveling "[w]ith the flow of traffic" but could not recall how fast he was driving.

Jones's accident reconstruction expert, David King, opined that Jones was traveling at approximately 55 to 60 miles per hour at the point the ramp begins to curve right. The State's reconstruction expert, Clay Campbell, opined that Jones was travelling around 57 to 61 miles per hour at the time he lost control of his car.

B. ***Signage***

A driver traveling north on the 605 freeway would encounter a series of signs as he approached the transition ramp. At the Valley Boulevard exit, the motorist would see a black and white traffic sign, stating that fines will be doubled in construction zones. Further north is a cantilever sign, notifying motorists that the 10 freeway is approaching and how the lanes will divide. Next is an orange and black "landscaping ahead" sign followed by an advisory 40 mile-per-hour speed limit on a luminaire, advising drivers that the speed limit on the interchange is 40 miles an hour. This advisory speed sign appeared on one side of the road. After the speed advisory, there is a sign bridge across the freeway with arrows directing motorists to various lanes depending on their destinations. Further north is the gore point for the connector ramp to the eastbound 10 and another cantilevered sign with arrows pointing left for Los Angeles and right for San Bernardino. Traveling on the connector ramp, a motorist would then encounter a

warning sign indicating that the roadway is slippery when wet. Before the connector ramp merges with the southbound 605 to eastbound 10 connector, there is a merge ahead warning device. These signs were present at the time of the accident. Jones did not recall seeing any of them.

C. *The Transition Ramp and Procedures for Building or Changing a Roadway*

Construction of the original transition ramp from the 605 north to the 10 east was completed by the California Department of Transportation (Caltrans) on November 4, 1964. As originally constructed, the transition ramp only had one lane. In 1969, Caltrans made plans to change the transition ramp from one to two lanes. That modification was completed the following year.

When Caltrans decides to build a roadway or alter a roadway, the design department at Caltrans creates design or contract plans, which set forth the manner in which the roadway will be constructed or altered. These plans are then signed by and "under the license of the engineer that supervises the design."

After construction is completed, the original design plans are reviewed to determine if any changes were made in the field. If such changes were made, they are written on the plans. An "as-built" stamp is affixed to the plans, after which the contract number is written in and the resident engineer then signs and dates each page of the plans, signifying that the construction is complete. The plans are then archived as as-builts.

Each page of the original plans contains an as-built stamp. Noticably absent, however, is the signature of the resident engineer or the date of completion of the project.

Superelevation is the banking of a roadway in order to counteract centrifugal force that makes a car want to move to the outside. In the 1960's, and thus at all times relevant to this appeal, Caltrans did not indicate superelevation on design plans. Rather, the resident engineer was given the responsibility to determine the superelevation in the field based on the design engineer's curve data and the guidance in the manual. Following construction, Caltrans does not generally measure the construction for superelevation.

D. ***Accident History on the Transition Ramp***

The accident history revealed that in the eight years prior to Jones's accident, there were five "run-off-the-road" accidents. Jones's accident was the sixth of this type. The drivers in four of these accidents had been drinking. In the eight years prior to Jones's accident, an estimated 132 million vehicles have traveled on the interchange.

E. ***Jones's Evidence***

Jones's engineering expert, Harry Krueper (Krueper), inspected the transition ramp three times and supervised a survey of the ramp. He also reviewed documents pertaining to the history of accidents on the ramp.

According to Krueper, the ramp contained a compound horizontal curve that immediately followed the crest of a vertical curve, impairing the ability of drivers to see that a sharper curve was approaching.[5] Krueper opined that a curve warning sign was needed on the ramp and that absent such a sign, the ramp was a hidden trap. He further noted that the ramp had an inadequate shoulder, no guardrail and no clear recovery zone to protect those cars that lost control. Krueper noted that the shoulder and lane widths met the applicable state standards, but recommended that the State install a guardrail on the left side of the curve.

Krueper further opined that the superelevation of the transition ramp was inconsistent and inadequate to counteract the centrifugal force of a vehicle traversing the ramp. As a result, cars were "thrown" towards the outside of the curve. In response, drivers made quick corrections, resulting in accidents, including rollovers. Krueper

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[5] Karen Mae Fong (Fong), a civil engineer employed by Caltrans, explained that a "compound curve is two curves in the same direction with no tangent in the middle." Tangent means anything straight, and a curve is anything that is not tangent. In Fong's view, compound curves serve no purpose. Fong explained that if the radius of one curve was significantly different than the other, it would cause confusion, because drivers expect to have the same radius around a curve.

confirmed that the resident engineer was responsible for determining the superelevation of the ramp.

Krueper also concluded that there was a lack of positive guidance for the ramp, meaning that there were no signs, including curve warning signs, to inform drivers of the impending curve and to properly slow drivers down and guide them through the ramp.

F. *State's Evidence*

In the opinion of Ed Nahabedian (Nahabedian), the State's engineering expert, the subject ramp was not in a dangerous condition at the time of the accident, and "the design of this roadway did not play any role in the happening of this accident." Nahabedian concluded that the design plans were reasonable and conformed to design standards. In reaching his conclusion, he relied upon "standards, the use of signage, the overhead signs, the signed bridges showing the arrows where the drivers should be, the three cantilever signs in the median of the freeway, northbound freeway, two signed bridges approaching the connector distributor road, four cantilever signs along both sides — along the right side of the freeway leading or guiding the motorists how to navigate onto the connector ramp to I-10 freeway." Nahabedian believed that the signage leading up to the ramp was appropriate to warn drivers about the ramp.

Several State witnesses confirmed that the applicable design plans did not specify the superelevation for the transition ramp and did not call for a compound curve. In the 1960's, when the ramp was originally built with one lane and later modified to two lanes, it was Caltrans's practice to handle superelevation in the field. Plans did not include superelevation diagrams.

Based on the State's studies and slope severity curve that developed from those studies, Nahabedian opined that a guardrail was not warranted on the curve. Nahabedian also opined that the shoulder and lane widths met the applicable state standards.

PROCEDURAL BACKGROUND

On January 12, 2005, American Home, Verizon's workers' compensation carrier, filed its first amended complaint for reimbursement of workers' compensation benefits against the State.[6] American Home sued the State for dangerous condition of public property. American Home alleged "that the subject motor vehicle accident and resulting injuries to [Jones] were proximately caused by a Dangerous Condition of Public Property which was created by defendant STATE OF CALIFORNIA and/or of which defendant had actual or constructive notice for a sufficient period of time to take corrective measures." Specifically, American Home identified the dangerous condition as the freeway interchange from the northbound 605 freeway to the eastbound 10 freeway and alleged that the interchange "was in such condition as to create a substantial risk of injury when used with due care in a reasonably foreseeable manner," as a result of the configuration of the ramp and the lack of adequate warnings or signage of a safe speed for the ramp. American Home sought general and special damages for Jones and reimbursement of past and future workers' compensation benefits.

In his first amended complaint in intervention filed September 19, 2006, Jones alleged two causes of action against the State. In his first cause of action for dangerous condition of public property, Jones alleged that the connector ramp was a dangerous condition due to its configuration, poor visibility and inadequate warnings/signage, that the connector ramp was a hidden trap, that the dangerous condition proximately caused Jones's injuries, and that the State had actual or constructive notice of the dangerous condition for a sufficient period of time to correct it. In his second cause of action for negligence, Jones alleged that the connector ramp had been negligently designed,

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[6] American Home also sued Honda of America Manufacturing and American Honda Motor Company, Inc. (collectively Honda) for negligence and strict products liability. Although the Honda defendants prevailed below, American Home expressly limited its appeal to that portion of the judgment in favor of the State.

constructed or maintained. Jones sought general damages, medical expenses, and loss of income and wages.[7]

In its answers to American Home's first amended complaint and Jones's first amended complaint in intervention, the State asserted, among other things, it had design immunity for the condition of the ramp pursuant to Government Code section 830.6.

Prior to trial, the court ruled on a plethora of motions in limine filed by the parties. Among the motions considered and granted was Jones's motion in limine no. 1, in which he sought to exclude evidence that he had been compensated for his injuries by independent collateral sources such as health insurance and workers' compensation insurance. As a result of this ruling, and because American Home was the collateral source of Jones's workers' compensation payments, the trial court omitted American Home's name from the caption of the case and the statement of the case read to the jury during voir dire, referencing only Jones. American Home did not appear for jury selection or trial. The jury thus was unaware that American Home was a party to the action.

Trial commenced in January 2009. After Jones rested, the State moved for a nonsuit pursuant to Government Code sections 835 and 830.6. It argued that it was entitled to nonsuit, in that Jones had failed to establish the existence of a dangerous condition as a matter of law. It further argued that it had design immunity and Jones failed to prove loss of that immunity.

The trial court denied the motion but noted that the State had design immunity and had not lost its immunity. The court stated it was giving the State immunity on design, including superelevation. It noted, however, that the evidence about signs and accidents was enough "to create a triable issue of fact to go to the jury."

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[7] Jones also sued Honda for negligence, breach of express warranty, breach of implied warranty, strict products liability, fraudulent concealment, false representation, negligent infliction of emotional distress and intentional infliction of emotional distress. Like American Home, Jones did not appeal from the judgment favorable to Honda. Thus, the Honda defendants are not parties to this appeal.

Trial thereafter continued with the State putting on its defense. When the evidentiary portion of the trial was completed, the State moved for directed verdict. As to Jones's cause of action for dangerous condition of public property, the court directed a partial verdict for the State on the issues of design immunity and loss thereof. The court concluded that the only issue for the jury was whether there was inadequate signage or a hidden trap. The court also directed a verdict for the State on Jones's cause of action for negligence.

On March 13, 2009, the jury commenced its deliberations at 11:38 a.m. and took its noon recess at 11:42 a.m. It resumed deliberations following lunch and returned a verdict that same afternoon. By a vote of 10 to 2, the jury found that the transition ramp was not a dangerous condition at the time of the accident. Judgment was entered on May 11, 2009. Honda served notice of entry of judgment on May 29.

On May 26, 2009, Jones filed a notice of intention to move for a new trial, a notice of intention to move to set aside the judgment and enter a new judgment and a motion for judgment notwithstanding the verdict. That same day, American Home filed a joinder to each of the three motions filed by Jones.

At a hearing held on June 26, 2009, the trial court denied Jones and American Home's motion to set aside the judgment. On July 9, the court denied their motion for judgment notwithstanding the verdict, finding that sufficient evidence supported the verdict. It also denied their motion for new trial on all grounds.

American Home's and Jones's appeals against the State followed.

DISCUSSION

A. *Cause of Action for Dangerous Condition of Public Property*

1. Overview of Applicable Law

a. Liability of a Public Entity for a Dangerous Condition

"A public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind

of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventive measures." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 68, fn. omitted; *Mirzada v. Department of Transportation* (2003) 111 Cal.App.4th 802, 806; Gov. Code, § 835.[8])

A "dangerous condition" is "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a); accord, *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1069.) A condition of property is not dangerous "if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." (Gov. Code, § 830.2; *Salas*, *supra*, at p. 1069.)

Whether a dangerous condition exists on public property must be determined on a case-by-case basis. (*Salas v. Department of Transportation*, *supra*, 198 Cal.App.4th at p. 1069.) Such a condition "can come in several forms and may be based on an 'amalgam' of factors. [Citation.] A dangerous condition of public property may arise

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[8] Government Code section 835 provides: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

from its damaged or deteriorated condition, from '"the interrelationship of its structural or natural features, or the presence of latent hazards associated with its normal use." [Citation.]' [Citation.]" (*Ibid*.)

Typically, whether a dangerous condition exists is a factual question. The issue may be resolved by the court as a matter of law, however, if reasonable minds can only come to one conclusion. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1133; *Salas v. Department of Transportation*, *supra*, 198 Cal.App.4th at p. 1070.) "'[I]t is for the court to determine whether, as a matter of law, a given defect is not dangerous. This is to guarantee that cities do not become insurers against the injuries arising from trivial defects.' [Citation.]" (*Salas, supra*, at p. 1070.)

b. Design Immunity

A public entity may avoid liability for an injury caused by a dangerous condition of its property if it pleads and proves the affirmative defense of design immunity. (Gov. Code, § 830.6[9]; *Cornette v. Department of Transportation*, *supra*, 26 Cal.4th at p. 66, 69;

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9 Government Code section 830.6 sets forth the conditions under which a public entity is immune from liability due to a dangerous condition of its property. It provides: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor. Notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow such public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by such

Cameron v. State of California (1972) 7 Cal.3d 318, 325.) "The rationale for design immunity is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design. [Citation.] '"'[T]o permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested.'" [Citation.]' [Citation.]" (*Cornette*, *supra*, at p. 69; accord, *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1262; *Morfin v. State of California* (1993) 12 Cal.App.4th 812, 815.)

"A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design. [Citations.]" (*Cornette v. Department of Transportation*, *supra*, 26 Cal.4th at pp. 66, 69; accord, *Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376, 383.)

A number of older cases state that design immunity is a legal question to be resolved by the court and that it is error to submit the question to a jury. (See, e.g., *Wyckoff v. State of California* (2001) 90 Cal.App.4th 45, 52; *Fuller v. Department of Transportation* (2001) 89 Cal.App.4th 1109, 1114; *Morfin v. State of California*, *supra*, 12 Cal.App.4th at pp. 815-816; *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565,

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legislative body or other body or employee. In the event that the public entity is unable to remedy such public property because of practical impossibility or lack of sufficient funds, the immunity provided by this section shall remain so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of the condition not conforming to the approved plan or design or to the approved standard. However, where a person fails to heed such warning or occupies public property despite such warning, such failure or occupation shall not in itself constitute an assumption of the risk of the danger indicated by the warning."

572.) Government Code section 830.6, however, clearly specifies, and the California Supreme Court recognized, that only the third element is to be determined by the trial or appellate court (*Cornette v. Department of Transportation*, *supra*, 26 Cal.4th at pp. 66, 72; *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 757). Thus, the first two elements, causation and discretionary design approval, are factual questions to be resolved by the trier of fact (*Hernandez v. Department of Transportation*, *supra*, 114 Cal.App.4th at pp. 383, 386-387; cf. *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 940, fn. 5) unless the facts are undisputed (*Grenier*, *supra*, at p. 941).

With regard to the third element of design immunity, "[Government Code s]ection 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether 'there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.'" (*Cornette v. Department of Transportation*, *supra*, 26 Cal.4th at p. 66; accord, *Weinstein v. Department of Transportation* (2006) 139 Cal.App.4th 52, 58.)

"The task for the trial court is to apply the deferential substantial evidence standard to determine whether any reasonable State official could have approved the challenged design. [Citation.] If the record contains the requisite substantial evidence, the immunity applies, even if the plaintiff has presented evidence that the design was defective. [Citation.] In order to be considered substantial, the evidence must be of solid value, which reasonably inspires confidence. [Citations.]" (*Arreola v. County of Monterey*, *supra*, 99 Cal.App.4th at p. 757.) The trial court does not weigh the evidence as to the reasonableness of the design but must grant immunity if the public entity offers any substantial evidence of its reasonableness. (*Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d 515, 526.) "[A]s long as reasonable minds can differ concerning whether a design should have been approved, then the governmental entity must be granted immunity." (*Id.* at p. 525.) The public entity need not prove that the design was perfect, only that it was reasonable under the circumstances. (*Ibid*.) Approval by competent professionals or a civil engineer's opinion is generally sufficient substantial

evidence of the reasonableness of the design. (*Grenier v. City of Irwindale*, *supra*, 57 Cal.App.4th at p. 941.)

c. Loss of Design Immunity

Design immunity may be lost and thus "does not necessarily continue in perpetuity." (*Cornette v. Department of Transportation*, *supra*, 26 Cal.4th at p. 66.) "[W]here a plan or design of a construction of, or improvement to, public property, although shown to have been reasonably approved in advance or prepared in conformity with standards previously so approved, as being safe, nevertheless in its actual operation under changed physical conditions produces a dangerous condition of public property and causes injury, the public entity does not retain the statutory immunity from liability conferred on it by section 830.6." (*Baldwin v. State of California* (1972) 6 Cal.3d 424, 438, fn. omitted; accord, *Cornette*, *supra*, at p. 71.)

The burden of demonstrating loss of design immunity rests with the plaintiff, who must establish the following three elements: "(1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings." (*Cornette v. Department of Transportation*, *supra*, 26 Cal.4th at p. 72; accord, *Baldwin v. State of California*, *supra*, 6 Cal.3d at pp. 431-438.) "[W]here triable issues of material fact are presented, . . . a plaintiff has a right to a jury trial as to the issues involved in loss of design immunity." (*Cornette*, *supra*, at p. 67.)

2. Propriety of Partial Directed Verdict

a. Standard of Review

A directed verdict in favor of a defendant is proper if, after disregarding conflicting evidence and drawing every legitimate inference in favor of the plaintiff, there is "'no evidence of sufficient substantiality to support a verdict in favor of'" plaintiff. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1119.) In ruling on the motion, the trial court may not weigh the evidence, consider conflicting evidence or judge the credibility of witnesses. (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 395.) On appeal, the reviewing court determines de novo whether evidence sufficient to withstand a directed verdict was presented. (*Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1154; *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 46-47.) If substantial evidence and the law support the plaintiff's claim, that portion of the adverse judgment based on the directed verdict must be reversed. (*Margolin v. Shemaria* (2000) 85 Cal.App.4th 891, 895.) Appellate review of an order granting a directed verdict is quite strict, with all inferences and presumptions being against such orders. (*Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, 432.) In performing its review, the appellate court views the evidence in the light most favorable to the plaintiff, resolves conflicts in the evidence and draws inferences in plaintiff's favor, and disregards conflicting evidence. (*Wolf, supra,* at p. 1119.)

b. Issues Presented

Plaintiffs contend that the trial court's determination that the State had design immunity must be reversed because two of the three elements are for the jury and, in any event, it was legally incorrect. They further contend that the State failed to meet its burden of proving the affirmative defense of design immunity and the finding of immunity was not supported by the facts. With regard to the issue of loss of design immunity, plaintiffs contends the trial court's finding must be reversed because the issue is one for the jury and the evidence established the elements necessary for a loss of

design immunity. Before reaching the merits of plaintiffs' claims, we think it prudent to set a backdrop for the court's ultimate ruling on the State's motion for a directed verdict.

c. Background

From the beginning of trial, the court appeared to be of the mindset that design defect was not an issue for the jury and that the State enjoyed design immunity. During a hearing on the State's motion in limine no. 2 for a preliminary trial of its design immunity defense, the trial court stated that a dangerous condition, rather than a design defect, had been alleged in the operative complaint, and that it would not permit the jury to hear about design defects. Counsel for the State interjected that "[t]here is a point of confusion then because the dangerous condition of public property that is being alleged by the plaintiffs is an improper design, improper configuration of the roadway." Following further discussion, the court stated, "But we're not going to talk about design defect. That's what I'm telling you right now, not to this jury."

Counsel for the State then inquired how it could defend itself if plaintiffs' expert testifies about the design of the highway. Counsel stressed that "highway design" was "what this case is about." The court noted that plaintiffs had to prove a dangerous condition and added, "[b]ut we're not talking about design defect of the highway. We're not getting into that." When counsel emphasized that plaintiffs' expert testified that the highway was designed unreasonably at his deposition, the court stated, "Just because they testified in their deposition doesn't mean they get to testify to it in court. You know, a deposition is for purposes of discovery to find out different things. But I'm trying to tell you now the case stands for the proposition that it is error for a jury to get any evidence on design defect. That's not for them. And it's not going to happen here."

Plaintiffs' counsel then stated, "we are going to talk about superelevation and the way in which it was constructed." The court replied, "I don't care what you've alleged in your complaint, counsel. You cannot go to the jury on — in regards to design defect." The court, which previously had quoted from *Wyckoff v. State of California, supra,* 90 Cal.App.4th at page 52, believed design defect was "not a jury question."

The issue came up again while a jury was being selected. During a hearing outside the presence of the prospective jurors, the trial court stated that "the design immunity issues [are] for the trial court, the loss of design immunity is for the jury." The court emphasized that it did not yet know the facts of this case but noted "from what I've gathered, the issue isn't the design. It's whether or not they've lost the design immunity because nobody asked for that issue to be resolved. So . . . I'm not changing my position that design immunity issues are irrelevant, and they're not going to go to the jury except to the extent that there was a . . . loss of the design immunity."

The court continued: "In other words, I don't know if you contend that when you . . . designed it you didn't need a barrier. There's no reason for a barrier. You have the advantage of knowing what the experts have said, and I don't. And now if the experts are saying it should have been designed with a barrier in the beginning, that's out. That's not even going to go. But whether or not there's a dangerous condition and the State is aware of the dangerous condition, you had notice of it, and whether or not you had the funds — I don't know what you're going to be using as a defense. But those issues — loss of design immunity goes to the jury. I don't know what more I can tell you on this thing because I'm dealing without facts."

Counsel for the State referenced the ruling the court had made the previous week and explained that she "understood it to mean that there was no evidence of design coming before the jury. Plaintiffs understood it to mean that they just couldn't go back to the 1962 plan and say that that plan was defective. And that's, I think, where the contention lies because I want to be sure that, for instance, if . . . any engineering witness gets on the stand and discusses the initial design plans as having lacked a barrier when the barrier should have been placed or they discuss superelevation or they discuss cross-fall or cross-slope or lane configuration, those are all design elements. And my confusion lies in the fact that I'm not sure how the witnesses will be allowed to testify if the issues of design are not to go before the jury. Because it's easy to argue that we should have had a barrier and that makes it a dangerous condition. But the issue of whether or not a barrier should have been there is a design element. So, in essence, the jury will be

hearing evidence of design. However, you will be the trier of fact as to whether or not the State has the initial design immunity. Then the jury will be the arbiter of facts as to whether or not there's a loss of immunity under the *Cornette* case." The court replied, "That's true."

When the State's counsel further inquired if it was entitled "to go into the plans, the approval of the plans, how the roadway was designed, and all of those features," the court answered: "As it's relevant to dangerous condition and your knowledge of a dangerous condition and those types of things, but not as to the design. I don't know how I can make myself any clearer." Counsel replied, "I don't know how I can make myself any clearer either, Your Honor, because the allegations in the complaint are all design features. The allegations regarding the way the ramp was built, that is design." The court, in turn, said, "Well, if that's the way it is and that's what the evidence is, they're going to get a nonsuit when you make your motion." It then added, "I'm not going to give that to the jury." The court emphasized that it was viewing issues in a "vacuum," in that it had not yet heard any of the evidence. It stated it would follow and apply the law.

The trial court next revisited the design immunity issue while plaintiffs' first witness was testifying. In a hearing outside the presence of the jury, Jones's attorney advised the court that her next witness would be used to establish that the State did not have design immunity with regard to superelevation or had lost immunity. In response the court stated, "You have no cause of action for anything to do with design." The court said that nothing about design could come in "because we're going to instruct this jury that the State is immune, absolute immunity, in design." When the court added, "And that isn't contested here," Jones's counsel immediately responded, "It is."

Counsel explained that one way in which she intended to show that the State did not have design immunity, for example, with respect to superelevation was to show that it was not part of the design plans, was determined by the contractor in the field and was not confirmed as part of the as-built process. Counsel emphasized that she could not prove a change in the condition of the roadway if she was prohibited from proving the condition of the roadway as constructed.

Following further discussion, the court stated, "I'll be honest with you. This is a dangerous condition, and I don't see anything involving design at all. At all. But I'm willing to listen and let them present their case. But it has to relate to dangerous condition. . . ."

During an Evidence Code section 402 hearing to determine the admissibility of Krueper's testimony, the court again ruled that "[t]o the extent that any design issues go to a dangerous condition, . . . you're not going to prevail on those issues." The court reiterated, "I'm going to decide the issue of design, and it's not going to go to the jury, and I'm trying to make that as clear as I possibly can." The court also stated, "I'm going to consider all the issues of design as this is going and at the end the jury is going to be instructed if they're still in the case that they're immune on design, and you got to remember what I'm saying to you."

The trial court's subsequent comments made when ruling on the State's motion for nonsuit demonstrate that it remained steadfast in its belief that the State had design immunity. The trial court said it had no "problem at all that there's no changes . . . and the State has design immunity. So superelevation or any of those types of things, that's not going to work. It's not going to fly. So that part — number one is — there's no loss of design immunity here. And I haven't heard anything in regards to design. But whether or not it's a dangerous condition is another story. But the superelevation — that is — there's nothing there. If that's all you have, I'll grant a nonsuit." The court added, "There's nothing wrong with the design. I don't find any — the immunity — they haven't lost their immunity because there hasn't been any changes."

When asked if the court was giving the State design immunity on superelevation, the court answered in the affirmative. The court clarified that there was other evidence regarding signs and accidents that are enough "to create a triable issue of fact to go to the jury. It's up to the State now to come up and defend it." The court added that based on Krueper's testimony it could not grant a nonsuit, "[b]ut there is design immunity. And we're going to instruct the jury, if we get that far, that there is design immunity. And it's nothing to do with the design. So it's just a question of whether or not you have other

factors such as signs and where they were and those types of things. And they are not immune from that."

The court denied the State's motion for nonsuit. It observed that the evidence while "very light" is "enough that I have to let it go to the jury." The court made it clear, however, that "there's no issue of design" and thus the "State is immune to design," including on the issue of superelevation. "So it's just a question of whether or not you have other factors such as signs and where they were and those types of things. And they're not immune from that." The court also noted that whether the State had notice of a dangerous condition is a question to be decided by the jury.

Following an additional exchange, the court stated: "[T]he design of the freeway itself is not an issue. The issue is whether or not . . . there was a dangerous condition there because of what drivers have been doing going through there and whether or not you're on notice that there's — whatever that was constituted a dangerous condition and whether or not — I don't know what it is. They've said signs. They've said you don't have notice of the curve soon enough when you get there and these types of things. So whether or not you're on notice that that constitutes a dangerous condition is for the jury to decide."

The court further added: "I have no problem with the way it was built. But if the way — as a result of the way it was built, it constituted a dangerous condition . . . . [¶] . . . And I just find triable issues of fact in regards" to some of the elements necessary to establish the existence of a dangerous condition. "But we are going to instruct [the jury] that the State has design immunity in regards to the design of it, the freeway."

Trial thereafter continued with the State putting on its defense. When the evidentiary portion of the trial was completed, the State moved for directed verdict on the ground that Jones failed to meet his burden of proving by a preponderance of the evidence that the connector ramp from the northbound 605 to the 10 eastbound was a dangerous condition. The State argued that there was nothing in the record establishing that the roadway caused Jones's accident, that the roadway presented a substantial risk of injury to the public, and that the State had notice of the dangerous condition.

The trial court granted the State a partial directed verdict on its affirmative defense of design immunity as to the design of the transition ramp, the need for a guardrail and superelevation. The court ruled "that as far as the roadway is concerned — is designed, the State is immune from any design defects. And the only issue for the jury is whether there is inadequate signage, whether or not there is a clear indication to approaching motorists of safe speed for the subject ramp, whether advisory sign is visible, whether it's a hidden trap. Those types of things are the only issues that are going to go to the jury on dangerous condition. So that's what the Court is going to allow." The court granted a directed verdict as to Jones's allegation that the freeway interchange was a dangerous condition due to the configuration of the ramp, but allowed Jones to proceed to the jury on his theory that the interchange was a dangerous condition due to the inadequacy and visibility of warnings and signage.

As to Jones's negligence cause of action, the court concluded "there isn't any evidence of negligence at all." It therefore granted the State a directed verdict on that cause of action.

With regard to loss of immunity, the court stated it was not deciding the issue of loss of immunity. Rather, it "decid[ed] there isn't anything to go to the jury on loss of immunity . . . . Loss of immunity would be a jury issue if there was anything to go to the jury." The court continued, "But I've ruled that the immunity is fine and they didn't lose any immunity. . . . I've found that the design — they're immune on the issue of design. Okay? That's what I'm ruling."

d. Analysis

As previously noted, the first two elements of design immunity and all elements necessary to establish loss of design immunity are questions of fact for the trier of fact, if the facts are disputed. (Gov. Code, § 830.6; *Cornette v. Department of Transportation*, *supra*, 26 Cal.4th at pp. 66, 72; *Hernandez v. Department of Transportation*, *supra*, 114 Cal.App.4th at pp. 383, 386-387; cf. *Grenier v. City of Irwindale*, *supra*, 57 Cal.App.4th at p. 940, fn. 5.) Plaintiffs maintain that the State failed to establish the first and third

elements of design immunity, namely, causation and reasonableness of the design plan. The third element, though factual in nature, is for the trial or appellate court to decide. The second element of design immunity, i.e., discretionary approval of the design plan before construction, is not at issue here.

"[B]y force of its very terms design immunity is limited to a design-caused accident. Stated otherwise, it does not immunize against liability caused by negligence independent of design, even though independent negligence is only a concurring proximate cause of the accident." (*Mozzetti v. City of Brisbane*, *supra*, 67 Cal.App.3d at p. 575; accord, *De La Rosa v. City of San Bernardino* (1971) 16 Cal.App.3d 739, 747; *Flournoy v. State of California* (1969) 275 Cal.App.2d 806, 811.) Thus, in order to establish the first element of design immunity, the State is required to prove that the dangerous condition alleged by plaintiff to have caused his injuries was part of the design plan. (*Grenier v. City of Irwindale*, *supra*, 57 Cal.App.4th at p. 940 ["The first element, a causal relationship between the plan and the accident, requires proof that the alleged design defect was responsible for the accident, as opposed to some other cause."].) If the State is unable to do so, design immunity cannot apply.

Jones contends that the State effectively negated the first element of design immunity, and thus its affirmative defense of design immunity, with the testimony of its engineering expert, Nahabedian, who opined that "the design of this roadway did not play any role in the happening of this accident." We do not agree. As reflected in its opening statement to the jury, the State's position was that Jones's "haste and inattention caused the accident," not the roadway. Surely the State was entitled to defend the lawsuit against it by taking the position that Jones alone was responsible for his own accident and that the roadway had nothing to do with it. To the extent, however, that plaintiff alleged that the transition ramp was a dangerous condition because of the manner in which it had been designed, the State was entitled to argue, alternatively, that it had design immunity. Similarly, Jones was entitled to argue in the first instance that the aspects of the transition ramp that made it a dangerous condition were not included in the plans, but if they were, the State did not have immunity or lost any immunity it may have once had. We

therefore conclude that Nahabedian's testimony did not, as a matter of law, preclude the State from establishing its affirmative defense of design immunity.

With regard to the element of causation, the State argues that it was "entitled to rely on Jones's allegations in the complaint that the accident was caused by the design of the freeway rather than some other cause to establish this element for the limited purpose of the application of the design immunity defense,"[10] citing *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536 and *Fuller v. Department of Transportation*, *supra*, 89 Cal.App.4th 1109. While *Alvis* and *Fuller* support the State's argument, when, as this case, the plaintiff adduces *evidence* at trial showing that the aspects of the roadway rendering it a dangerous condition were *not* part of the design, the State must introduce evidence to the contrary in order to satisfy its burden of establishing causation. (See, e.g., *Cameron v. State of California*, *supra*, 7 Cal.3d at p. 326 [design immunity does not immunize a public entity from liability for those elements of a roadway that are not included in the design plans].) And in the face of conflicting evidence, as in this case, it is for the jury to resolve the issue.

Jones's position was that the State could not be immunized for certain features of the transition ramp, for example, superelevation and the compound nature of the curve, because these particular features were not included in the design plans. Engineers from Caltrans testified that superelevation was not reflected in the plans for the original one lane transition ramp or the subsequent plans converting the ramp into two lanes. They explained, however, that in the 1960's when the plans were drafted and when the construction took place, it was Caltrans's practice not to indicate superelevation on the plans. Rather, the resident engineer was given the responsibility to determine the superelevation in the field based on the design engineer's curve data and the guidance in the manual. In *Uyeno v. State of California* (1991) 234 Cal.App.3d 1371, which was abrogated on another ground in *Cornette v. Department of Transportation*, *supra*, 26

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10 Contrary to plaintiffs' assertion, this is not the first time that the State has taken this position. Counsel for the State took this position below.

Cal.4th at page 74, footnote 3, the court observed that "[w]hen a part of an improvement is integral to its function, it must be considered to be within the scope of the design for that improvement, even if it is to be later formulated." (*Uyeno*, *supra*, at p. 1377.) Although at issue in *Uyeno* was the second element of design immunity, i.e., prior approval of the design, the quoted language is equally applicable when deciding if a particular design feature is part of the design in the first instance. Thus, factual issues as to whether superelevation was integral to the design, whether the individual who actually determined what the superelevation should be was authorized to do so, and whether the superelevation was properly calculated were all factual questions for the jury to resolve.

Moveover, apart from the calculation or percentage of superelevation, Jones's expert, Krueper, testified that the superelevation of the transition ramp was inconsistent and inadequate to counteract the centrifugal force of a vehicle traversing the ramp. As a result, cars were "thrown" towards the outside of the curve. Whether the superelevation was in fact uneven, whether it was constructed in an uneven manner or whether the topography of the ramp changed over time are all factual questions relevant to the design immunity inquiry.

With regard to the nature of the curve, Jones presented evidence that the transition ramp had a compound curve and that such a curve did not appear on the plans. The State countered with evidence that the curve, as built, was not a compound curve but rather a single curve. Thus, whether or not a compound curve existed and whether the design called for a compound curve were factual issues that should have been decided by the jury before design immunity could be conferred.

In this case, however, the trial court concluded from the outset of the case that the State had immunity. Although the court did permit evidence relevant to the design immunity issue to be introduced, it held steadfast in its view regarding immunity. Given the trial court's mindset, the factual issues relevant to the causation element of design immunity were withheld from the jury and thus bypassed. The same is true of the factual issues relevant to loss of design immunity. We conclude that evidence sufficient to withstand a directed verdict was presented and that the trial court improperly directed a

verdict for the State on the issues of design immunity and loss of design immunity. (*Magic Kitchen LLC v. Good Things Internat., Ltd.*, *supra*, 153 Cal.App.4th at p. 1154; *Gelfo v. Lockheed Martin Corp.*, *supra*, 140 Cal.App.4th at pp. 46-47.) Reversal of the judgment and remand for a new trial are warranted.[11] (*Wolf v. Walt Disney Pictures & Television*, *supra*, 162 Cal.App.4th at p. 1119; *Margolin v. Shemaria*, *supra*, 85 Cal.App.4th at p. 895.)

B. *Cause of Action for Negligence*

Plaintiffs contend the trial court's grant of a directed verdict on Jones's negligence cause of action must be reversed because it was not supported by the facts. We conclude that the trial court's decision to direct a verdict for the State on Jones's negligence claim stemmed from the improper thought processes it used to direct a verdict for the State on Jones's cause of action for dangerous condition of public property. As such, this cause of action must be tried anew as well. We note, however, that to the extent the State, on appeal, claims immunity under section 820.2, the State failed to assert this affirmative defense in its answer.

C. *Juror Misconduct Also Warrants a New Trial*

Plaintiffs moved for a new trial on the ground of jury misconduct. Plaintiffs maintained, among other things, that the jury engaged in misconduct by failing to deliberate. The trial court denied plaintiffs' motion. On appeal, plaintiffs contend that the trial court improperly did so. We agree.

The jury went into the jury deliberation room at 11:32 a.m. on March 13, 2009, after a lengthy trial. The court called the jury back into the courtroom at 11:37 a.m. and read it a jury instruction it had inadvertently omitted. At 11:38 a.m., the jury returned to the deliberation room, and at 11:42 a.m. the court took its noon recess. The record does

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11 In light of our conclusion that a new trial is required, we need not address Jones's challenge with respect to the third element of design immunity.

not indicate the time at which the jury recommenced deliberating after lunch, but by 3:18 p.m. the jury was in the courtroom, having reached a verdict. The verdict was 10 to 2 for the State. At 3:28 p.m., the trial court dismissed the jury.

Thereafter, Jones's attorney, Kathleen Carter, went out into the hallway to talk to the jurors. Among the jurors she spoke with was J.C. Attorney Carter observed J.C. standing alone by the elevators. She seemed upset. When Attorney Carter spoke to her, J.C. "was near tears" as she spoke negatively of her experience as a juror. J.C. provided Attorney Carter with a declaration, detailing comments made by the jury foreperson and the jury's failure to deliberate. This declaration was submitted in support of Jones's motion for a new trial.[12]

J.C. declared: "This was the first time I had ever served on a jury and it ended up being a horrible experience that left me disappointed in the system and my fellow jurors, several of which slept through a good portion of the trial." "I expected all of us to discuss the evidence and testimony that we had all heard and our opinions as to what side we each thought should prevail and why." Instead, when the jury entered the deliberation room, the jury foreperson, J.E.,[13] told his fellow jurors: "Norwood's going to get a lot of money. Let's vote. I want to get out of here." The jury then voted with only J.C. and A.M. voting in favor of Jones.

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[12] Juror affidavits may be used to establish juror misconduct occurring inside or outside the jury room, but they may not be used establish the mental processes by which jurors arrive at their decisions. (Evid. Code, § 1150, subd. (a); *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124-1125; *Bandana Trading Co., Inc. v. Quality Infusion Care, Inc.* (2008) 164 Cal.App.4th 1440, 1446.)

[13] Prior to his retirement, J.E. had worked in the insurance industry. He worked as a broker for 25 years, and for 14 years prior to that, he worked in management. He also worked as a claims adjuster for two years. He was an independent broker who sold insurance for many companies, and he also sat on executive boards of the Joint Powers Insurance Authority and executive committees at several insurance companies. During voir dire, he acknowledged that after a career in the insurance industry, he was a bit more defense minded.

J.C. then asked if they were going to deliberate and discuss their votes. J.E. said there were enough votes and that what J.C. and A.M. said did not matter. J.C. commented that "the decision was too important to be taken so lightly because it was someone's life we were talking." J.E. replied, "He's going to get a lot of money. Don't worry about him." No deliberations followed this exchange.

"On appeal from denial of a motion for new trial on grounds of juror misconduct, the appellate court, '"""has a constitutional obligation [citation] to review the entire record, including the evidence, and to determine independently whether the act of misconduct, if it occurred, prevented the complaining party from having a fair trial."""' [Citation.]" (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 817-818; accord, *Bandana Trading Co., Inc. v. Quality Infusion Care, Inc.*, *supra*, 164 Cal.App.4th at p. 1445.) A presumption of prejudice may be rebutted by evidence negating prejudice. (*Iwekaogwu*, *supra*, at p. 818.) The analysis of prejudice resulting from juror misconduct "'is different from, and indeed less tolerant than,' normal harmless error analysis, because jury misconduct threatens the structural integrity of the trial." (*McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal.App.4th 256, 266.) Misconduct is not prejudicial if it "'is of such trifling nature that it could not in the nature of things have prevented either party from having a fair trial.'" (*Bandana Trading Co., Inc.*, *supra*, at p. 1445, quoting *Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 507.)

"A refusal to deliberate constitutes misconduct; the parties are entitled to the participation of all 12 jurors." (*Andrews v. County of Orange* (1982) 130 Cal.App.3d 944, 959, disapproved on another ground in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5.) """Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. . . ." [Citation.]' [Citation.]" (*Vaughn v. Noor* (1991) 233 Cal.App.3d 14, 22.) Although the issue in *Vaughn* centered around the court's failure to instruct the jury to start deliberations anew after an alternate juror replaced an original jury member, the quoted language applies in this case.

Although factually inapposite, *Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, which neither party cites, provides some guidance here. In *Vomaska*, an action alleging a dangerous condition of public property, the jury reached a verdict before being provided with the exhibits. After selecting a foreperson, the jurors took a straw vote to see where they stood. Each juror wrote his/her vote on a separate piece of paper. As to the first question whether there was a dangerous condition, 10 jurors voted "no" and 2 voted "yes." The foreperson then said, "'[t]hat's it'" and, without any discussion by the jurors of their individual views, filled out and signed the special verdict form, finding that the public property was not in a dangerous condition at the time of the accident. The plaintiffs thereafter unsuccessfully moved for a new trial on the ground of jury misconduct. (*Id.* at p. 909.)

On appeal, the plaintiffs argued, among other things, that the judgment should be reversed because the jury's complete failure to deliberate violated their constitutional right to trial by jury. The appellate court rejected plaintiffs' argument. It noted that on its face, Code of Civil Procedure section 613, which states that "[w]hen the case is finally submitted to the jury, they may decide in court or retire for deliberation," "suggests there is nothing impermissible in simply taking a vote and rendering a verdict if the jury chooses to do so." (*Vomaska v. City of San Diego*, *supra*, 55 Cal.App.4th at p. 910, italics omitted.) The court then referenced the jury instruction telling the jury to discuss the case. Noting "this would be the preferred procedure so as to ensure the jury carefully considers the evidence and the possible varying interpretations thereof," the court stated, however, that "we are not persuaded that a party's constitutional right to have his case decided by a jury includes the right to compel jurors to discuss issues which they have chosen to decide without discussion." (*Id.* at p. 911, fns. omitted.)

The *Vomaska* court further stated: "The jurors here took a straw vote to see how they each viewed the issue, and when that vote revealed 10 jurors were in agreement, they decided to render a verdict rather than discuss the issue further. This procedure is a type of 'deliberations,' in that each juror—having considered the evidence and arguments independently—is setting forth his or her opinion, albeit without accompanying reasons

or explanations. We note this is not a case where the jury does choose to discuss a case, in which situation each juror must have the opportunity to participate equally in all discussions in order to satisfy the constitutional right to trial by jury. [Citations.]" (*Vomaska v. City of San Diego, supra,* 55 Cal.App.4th at p. 912.) After noting that there was no indication that "any jurors were compelled to render a vote before they were ready to do so" (*ibid.*), the court stated, "Admittedly here, the jurors were not of a unanimous opinion, the vote being split 10 to 2. However, absent some overt conduct or statements showing jurors were pressured to close deliberations before they were ready, we see no misconduct." (*Id.* at p. 912, fn. 12.)

This case is factually distinguishable from *Vomaska* because *J.C.* was compelled to close deliberations before she was ready to do so. After J.E., who had been a claims adjuster for two years, said "Norwood's going to get a lot of money. Let's vote. I want to get out of here," the jury took a straw vote resulting in a 10 to 2 vote in favor of the State. J.C., who initially voted for Jones, asked if they were going to deliberate and discuss their votes. J.E. told J.C. there were enough votes and that what she and A.M. thought did not matter. When J.C. emphasized that the decision was too important to be taken so lightly because a person's life was involved, J.E. reiterated that Jones was going to get a lot of money and told J.C. not to worry about him. Despite J.C.'s request to talk about the issues in the case, no deliberations followed. Thus, unlike *Vomaska*, this is not a case where the entire jury chose not to discuss the case. This is a case where 10 jurors refused to deliberate with two jurors with differing opinions, one of which expressly voiced her desire to talk about the issues.

We conclude that, under the particular facts of this case, the jury's failure to deliberate was misconduct. We also conclude that the misconduct was prejudicial to plaintiffs. As previously noted, "the parties are entitled to the participation of all 12 jurors." (*Andrews v. County of Orange*, *supra*, 130 Cal.App.3d at p. 959.) Because plaintiffs were deprived of this right and we have no way of knowing what the outcome of the case would have been if deliberations took place, we are compelled to reverse the judgment and order a new trial. As observed in *Andrews*, "[w]e realize that this sets at

naught the fruits of an extended and costly trial. However, the cost of a new trial is a small price to pay for the vindication of the constitutional right to a trial by a fair and impartial jury . . . ." (*Id*. at p. 960.)

D. *Plaintiffs Are Not Entitled to Judgment in Their Favor*

We summarily reject plaintiffs' assertion that the evidence at trial requires entry of judgment in their favor on all causes of action. By no means is the evidence undisputed in this case and by no means does it establish the State's liability for dangerous condition of public property or negligence as a matter of law. To be sure, a trier of fact reasonably could conclude from the evidence that Jones contributed to his own accident by speeding.

E. *Other Claims of Error*

In light of our determination that a new trial is warranted, we need not address plaintiffs' numerous claims of instructional and evidentiary error.

DISPOSITION

The judgment is reversed and the matter remanded for a new trial on all causes of action. Plaintiffs' appeal from the order denying their motion for a judgment notwithstanding the verdict is dismissed as moot. Plaintiffs' appeal from the nonappealable orders denying their motion for a new trial and motion to vacate the judgment are dismissed. Plaintiffs are awarded their costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J. WOODS, J.